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10/562,173	12/17/2007	Anthony John Barraclough	F7711(V)	1312

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EXAMINER

HEGGESTAD, HELEN F

ART UNIT	PAPER NUMBER
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1789

NOTIFICATION DATE	DELIVERY MODE
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ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary	Application No. 10/562,173	Applicant(s) BARRACLOUGH ET AL.	
	Examiner Helen F. Heggestad	Art Unit 1789	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 December 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 26, 28-30 and 32-37 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 26, 28-30, 32-37 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 26, 30, 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gordon, page 107 in view of Rumberger (3,630,759) and Guadagni (2,780,551), and further in view of Sims et al. (XPOO8025210 – applicants' reference).

Claim 26 requires that the fruit was ripened under particular conditions. Gordon discloses a method of ripening avocados by buying hard avocados and storing them until ripe and then refrigerating them for up to 4 days. Certainly the time between picking the fruit and getting it to the stores is not more than 4 weeks, as fruit only has a particular length of time it needs for ripening, which is seen to have been within the skill of the ordinary worker to determine. Ripening of avocados from personal experience takes up to 3 days after they are bought. The claimed temperature can be room temperature. The reference discloses various pulps such as apple and apricot (col. 7 and col. 12). Most rooms with the lights are dark part of the day. Therefore, it would have been obvious to ripen as claimed.

Claim 26 further requires heating the pulp for less than 3.5 minutes. Guadagni discloses a process of heating fruit from 10 seconds to 10 minutes just enough to deactivate surface enzymes (col. 3, lines 40-46). Certainly, particular times could be achieved depending on the temperature used. The specification discloses that the pulp is heated until there are no active enzymes (page 7, 2nd para.). Guadagni also discloses that it is known to add ascorbic acid to fruit and then to heat process it (col. 4, lines 55-63). Also, Jen discloses various preservation methods, which are used to preserve fruit (page 209, first para.). The particular length of time of heating is seen to have been within the skill of the ordinary worker since heating is one of the processes used in preserving foods. Sims et al. disclose that it is known that heating a puree to 90 C inactivates poplyphenoloxidase (an enzyme), and reduces browning in juices. Browning is known to be caused by enzymes. Bananas could also be heated to 80 for 1 to 2 minutes (abstract). Therefore, it would have been obvious to treat for the length of time required to deactivate enzymes because it is known to treat to deactivate surface enzymes, and further heating would certainly deactivate the enzymes found in the inner fruit.

Claim 26 was amended to require the temperature was from 30-90 C. However, as a most sensitive fruit such as avocado is being processed, it would have been obvious to heat at a low enough temperature so as not to cook it.

It is not seen at this time that the avocado does not have the proper hardness factor since it has not been cooked. It is well known to harvest fruit before it is ripe and

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to let it ripen to a particular hardness factor. Therefore, it would have been obvious to ripen fruit to a particular hardness factor.

Claim 30 further requires a particular relative humidity (RH) for storage.

Rumberger discloses that it is known to store avocados in a RH of 50% in packages (abstract and col. 5, lines 73-75, col. 6, lines 1-9). Therefore, it would have been obvious to store at the claimed humidity in the process of the combined references as shown by Rumberger.

Claims 26 and 32 further requires that the chunks have particular dimensions. However, it is within the skill of the ordinary worker to make a product containing particular sizes of ingredients such as fruits depending on what the product is used for. Certainly, in dips and spreads one might want a larger chunk than in a bakery item. It is not seen how a particular particle size can be obtained by mashing a product, if it was mashed into a mush. Therefore, it would have been obvious to cut or mash the fruit to make a particular chunk size.

Claims 28, 29, 33, 34, 36, and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Huchette et al. (4,160,849) and further in view of Guadagni (2,780,551).

The reference to Huchette et al. disclose various pulps such as apple and apricot (col. 7 and col. 12). However, the above combined references show other fruit, and nothing is seen at this time that the fruits have different processing problems. For instance, avocado is a climacteric fruit just as are the apples of the references (page

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176, Jen, 2nd para.). Therefore, it would have been obvious to treat like fruit the same because they present the same problems.

Claims 28 and 29 , 33 further require that the pulp composition contains water, fruit pulp and oil in particular amounts, and no detrimental enzyme activity after heating. Huchette et al. disclose a composition containing a potato pulp base, as in claim 28, which is mixed with tomato as in a sauce or with fruit such as apples (abstract and col. 7, lines 40-70). Water is used at within the claimed amounts. Huchette et al. disclose a composition containing 6 g. of oil (col. 7, lines 15-25). The enzymes have been killed by heating as above. The stabilized fruit pulp has been shown above. Therefore, it would have been obvious to add a stabilized pulp composition containing fruit pulp, water and oil, with no enzyme activity to a thickening base since Huchette et al. disclose that it is known to add thickening base such as potato pulp to tomato to make a sauce, and nothing is seen that a potato pulp could not have been added to other pulps for the same function of thickening the pulp.

The viscosity of the mixture can be from 12,000-17,000 cps as in claim 34 as disclosed by Hutchette (col. 7, lines 55-60). Claim 34 differs from the reference in the use of stabilized avocado pulp. It would have been within the skill of the ordinary worker to produce a particular viscosity particular since the claimed ingredients have been disclosed above, and producing a particular viscosity only requires adding more thickening agent such as potato pulp of Hutchette et al. Therefore, it would have been obvious to make a particular viscosity as shown by Hutchette in the process of the combined references.

Guadagni discloses as above that it is known to stabilize fruits. Certainly, heating fruit will stabilize it or destroy the enzymes, whatever the form it is in. Therefore, it would have been obvious to use the stabilized fruit of Guadagni in the composition of Huchette in order to make a product free of destructive enzymes which is thereby stabilized.

Claim 36 requires that the stable puree can be used in various ways. Huchette et al. disclose that the composition can be used in sauces, which are similar to dips and spreads, which mainly differ in the particular ingredients of the composition. Therefore, it would have been obvious to use the puree in various products.

Claim 28 further requires particular amounts of a fat, and water. Certainly, fat is added to compositions as in spreads and dips and nothing new is seen in this and claim 36 requires that the puree can be used as a cooking and baking additive and with other foods. Attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected

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ingredients, which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Fats are well known to be added to various compositions for flavor and calories.

Claim 37 requires that various additives are present. Hutchette et al. disclose flavorings such as powdered onion, salt, pepper and garlic (col. 7, lines 15-25). Therefore, it would have been obvious to use known flavorings in the claimed composition.

Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims, and further in view of Jen (Quality Factors of Fruits and vegetables), page 211 and 218.

Claim 35 requires a particular pH. Hutchette et al. disclose the use of tomato paste, which is acidic in itself (abstract). The use of acids is disclosed in other formulations such as with apricot pulp (col. 12, lines 45-53). Even though avocado is not mentioned, it is considered to be a fruit, and nothing is seen that it could not be treated in the same manner as other fruits. Guadagni discloses that it is known to add ascorbic acid in syrup (col. 1, lines 65-70, col. 4, lines 54-60). The exact pH is not stated in the reference to Hutchette et al, but it is noted that acids are used which lower the pH of the composition, thereby providing further stabilization. Also, Jen discloses that it is known to use acids in food preservation (page 211, last para., page 218, 2nd and 3rd. para.). Therefore, it would have been obvious to modify the pH of fruit products

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for the known function of preventing spoilage as shown by Jen in the process of the combined references.

CONTINUITY

Applicants should add their continuing information as the first line in the specification.

ARGUMENTS

Applicants' arguments filed 12-13-10 have been fully considered but they are not persuasive. Applicants argue that the references to Gordon and Guadagni do not teach the particular size of avocado chunks, mixing with an acidulant, and that Hutchette does not remedy the problem. However, making fruit pieces a particular size is so well known that it hardly needs a reference as this practice only requires reducing the fruit to a particular size depending on the purpose the fruit is used for. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (hereafter, "KSR"). Nothing has been shown that the claimed size of avocado chunks makes for any more of an acceptable product than pulped avocado, to small chunks to larger than that claimed. Applicants' specification discloses in Example 1 lines 1-10, that the fruit is mashed to a pulp or a puree. Generally avocado dips are not very smooth, but somewhat lumpy. It is not known how other sizes of avocado dip pieces compare with that claimed. Also, it would have been obvious that the smaller the chunk size the easier it would have been for the acid to penetrate the avocado flesh and provide stabilization and preservation of the product.

The references to Hutchette and Sims are not regarded by Applicants as teaching their invention. However, they are used for what they teach as in the office action and have been combined with other references.

Applicants argue that the use of so many references teaching only one part of the invention, means that the invention is not viewed as whole. However, many references are needed to teach each step, to show that many of the steps are known or are obvious with nothing new or unpredictable being seen.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Heggestad whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Keith Hendricks, who can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Helen F. Heggestad/

Primary Examiner, Art Unit 1789

2-2-11